CLERK'S COPY.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1928 9

No. 723 44

DISTRICT OF COLUMBIA, PETITIONER,

*vs.*

GEORGIANA THOMPSON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED FEBRUARY 26, 1929

CERTIORARI GRANTED MARCH 11, 1929

(34,032)

# (34,032)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1928

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*vs.*

GEORGIANA THOMPSON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 22, 1929

[fol. 1] [Caption omitted]

## IN MUNICIPAL COURT OF THE DISTRICT OF COLUMBIA

No. 152,973

GEORGIANA THOMPSON, Plaintiff,

vs.

DISTRICT OF COLUMBIA, Defendant

DECLARATION—Filed June 22, 1927

DISTRICT OF COLUMBIA, ss:

Georgiana Thompson, being first duly sworn on oath deposes and says that she is the plaintiff herein, that she has knowledge of the facts herein contained, and that she has a good cause of action against the defendant, said cause of action being as follows:

[fol. 2] On March 1, 1912, there was approved an Act of Congress entitled, "An act to authorize the extension of Lamont Street, Northwest, in the District of Columbia." That in pursuance of the authority of the said statute the Commissioners of the District of Columbia instituted condemnation proceedings in the Supreme Court of the District of Columbia, such procedings being known as District Court Case No. 1040 "In Re: The Extension of Lamont street Northwest." That in the said condemnation proceedings the jury allowed as the value of the land condemned, known as a portion of Square 2605 and Square 2604, $13,737.48 and costs of $463.78 or a total of $14,201.26 such sum being assessed as benefits against the adjacent property in the abutting squares, 2602, 2603, 2604, 2605, 2606, 2607 and your plaintiff, as the owner of Lot 101, Square 2603, was assessed $200.00 as the amount of her proportionate share of the said benefits. That the said payment was made under obligation of law to the Collector of Taxes of the District of Columbia such sum being the special assessment on Lot 101 in Square 2603, yet notwithstanding the authorization of the above mentioned statute

or the said condemnation proceedings instituted in the Supreme Court of the District of Columbia or the payment of such special assessment, the District of Columbia has wholly failed to extend Lamont Street Northwest, through square 2604 and 2605, the said property condemned being yet unimproved by street extension. That the said District of Columbia has wholly abandoned, renunciated and repudiated the purpose of the said condemnation, as authorized by the aforesaid act of Congress of March 1st, 1912. That your plaintiff is advised and believes that under the circumstances, the assessment so made is not a proper charge against the property of your affiant, and she in entitled to be repaid by the defendant, the amount so paid as aforesaid. That demand has been made upon the defendant for the same but that the same has not been paid, so that there is now due and owing to the plaintiff from the defendant, exclusive of all set-offs or just grounds of defense, the sum of Two Hundred Dollars ($200.00), for which amount the plaintiff claims judgment besides costs of this action.

(S.) Georgiana Thompson.

[fol. 3] Subscribed and sworn to before me this 9th day of June, A. D., 1927. (S.) William C. Strauss, Notary Public, D. C. (Seal.)

Particulars of Demand

| | |
|---|---|
| Total value of land condemned | $13,737.48 |
| Costs of Condemnation | 463.78 |
| | $14,201.26 |
| Plaintiff's portion of assessment paid to Collector of Taxes, D. C. | $200.00 |
| Amount Due Plaintiff | $200.00 |

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In Municipal Court of District of Columbia

Amended Plea to the Jurisdiction—Filed July 15, 1927

Comes now the defendant in the above entitled cause by its attorneys and says that this court ought not to have or

take further cognizance of the action aforesaid, because it says that the supposed cause of action does not arise out of any contract, express or implied, whereby any debt is due the plaintiff, herein, nor does the amount claimed by this plaintiff arise out of damages due from the same or from any wrong or injury to this plaintiff or her property.

(S.) William W. Bride, Edward W. Thomas, Attorneys for Defendant.

*Duly sworn to by Edward W. Thomas. Jurat omitted in printing.*

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[fol. 4] IN MUNICIPAL COURT OF DISTRICT OF COLUMBIA

AFFIDAVIT OF DEFENSE—Filed July 15, 1927

DISTRICT OF COLUMBIA, ss:

Chatham M. Towers, being first duly sworn on oath deposes and says that he is the Collector of Taxes of the District of Columbia, defendant herein, and that he has knowledge of the facts herein contained upon information and belief and that the plaintiff, Georgiana Thompson ought not to have and maintain this cause of action for that:

The object of the above entitled cause is to recover an assessment for benefits, lawfully made by a verdict of a jury duly returned and recorded in the Supreme Court of the District of Columbia on the 10th day of January, 1913, for the condemnation of land for the extension of Lamont Street through squares 2604 and 2605, in the District of Columbia, whereby the title to the land condemned became vested in the District of Columbia, and whereby plaintiff, herein, as owner of lot 101, square 2603, was assessed the sum of Two Hundred Dollars ($200.00) by the said verdict returned and the confirmation thereof by the Supreme Court of the District of Columbia, which said sum of Two Hundred Dollars ($200.00) became a lien upon the land so assessed to be collected as special improvement taxes, sixty days after the confirmation by the said Supreme Court of the District of Columbia on the 10th day of February, 1913, of the aforesaid verdict of the condemnation jury, and protesting and denying that it is unnecessary to the object of this suit to deny that the District of Columbia has wholly

abandoned, renunciated and repudiated the purpose of the condemnation of said land for the extension of Lamont Street aforesaid through squares 2604 and 2605 or that said land condemned is not improved by street extension, the same is denied; and as to the payment by this plaintiff of the sum of $200.00 as set forth in the affidavit of merit, said sum was not paid to the defendant, the District of Columbia within five years from the period commencing sixty days after the confirmation by the Supreme Court of the District of Columbia of the aforesaid verdict of the jury for the acquisition of land for the extension of Lamont [fol. 5] Street, nor within two years after date of service of notice to this plaintiff that the assessment for said improvement of $200 as set forth in the affidavit of merit herein remain unpaid, for which non-paym*n*et of this lawful assessment, lot 101, square 2603, was sold on March 17, 1921 and thereafter redeemed from said sale by the payment of the sum of $200 and interest to the Collector of Taxes of the District of Columbia by the plaintiff, the District of Columbia has no knowledge or information sufficient to form a belief, but says that more than three years has elapsed since the time when the right, if any, to maintain this action by the plaintiff accrued to her.

(S.) C. M. Towers, Collector of Taxes, D. C.

Subscribed and sworn to before me this 5th day of July, 1927. (S.) Adam A. Giebel, Notary Public, D. C. (Seal.)

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IN MUNICIPAL COURT OF DISTRICT OF COLUMBIA

JUDGMENT—September 19, 1927

It appearing under Rule of Court that judgment in finding in this cause should be entered, it is so ordered. Wherefore, it is considered that the plaintiff recover of the defendant the sum of Two Hundred Dollars ($200.00), with interest from date, and costs, and have execution thereof.

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IN MUNICIPAL COURT OF THE DISTRICT OF COLUMBIA

No. 152,973

GEORGIANA THOMPSON, Plaintiff,

vs.

DISTRICT OF COLUMBIA, Defendant

BILL OF EXCEPTIONS AND ORDER SETTLING SAME

Be it remembered that there was filed in the Municipal Court of the District of Columbia, on June 22, 1927, an ac-
[fol. 6] tion in assumpsit by the plaintiff in the above entitled cause, against the defendant herein, seeking to recover the sum of $200, representing special benefits assessed against certain property of plaintiff, to wit: Lot 101, Square 2603, by a verdict of a jury rendered in the Supreme Court of the District of Columbia on January 10, 1913, and confirmed by that Court on February 3, 1913, in District Court No. 1040 entitled "In Re: the Extension of Lamont Street, Northwest," and paid to the Collector of Taxes of the District of Columbia, a municipal corporation, on March 15, 1923 to redeem said property as provided by section 491j of the Code of Law for the District of Columbia. The said condemnation proceeding was authorized by the following Act of Congress:

"Public—No. 93

(S. 238)

An Act to Authorize the Extension of Lamont Street Northwest, in the District of Columbia

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That under and in accordance with the provisions of subchapter one of chapter fifteen of the Code of Law for the District of Columbia, within six months after the passage of this Act, the Commissioners of the District of Columbia be and they are hereby authorized and directed to institute in the Supreme Court of the District of Columbia a proceeding in rem to condemn the land that may be nec-

essary to extend Lamont Street northwest through squares numbered twenty-six hundred and four and twenty-six hundred and five, with a width of ninety feet, said extension to be a direct prolongation of Lamont Street as not existing east of Nineteenth Street. Provided, however, That the entire amount found to be due and awarded by the jury in said proceeding as damages for and in respect of the land to be condemned for said extension, plus the costs and expenses of said proceeding, shall be assessed by the jury as benefits.

Sec. 2. That there is hereby appropriated, out of the revenues of the District of Columbia, an amount sufficient [fol. 7] to pay the necessary costs and expenses of the said condemnation proceeding taken pursuant hereto, and for the payments of the amounts awarded as damages, to be repaid to the District of Columbia from the assessments for benefits and covered into the Treasury to the credit of the revenues of the District of Columbia.

Since the ratification of the verdict in the aforesaid condemnation case, and since the acquisition of the land involved by the District of Columbia, as the appropriating party, and up to the time of the filing of this suit, said land has not been laid out into roadway, sidewalk, or parking space, nor has it been graded, paved or otherwise physically improved for highway purposes, although the land is open, vacant property lying between two improved highways, to wit: 19th Street and Adams Mill Road, and is in the shape of a rectangular lot, ninety feet wide, with a grade sloping westward. On the south side of the lot for a distance of about one hundred and fifty feet, a cement sidewalk is laid, constructed by a private person as an entrance to an apartment house as the result of permit issued therefor by the defendant. Since the ratification of the verdict in the afore-mentioned condemnation case and since the acquisition of the land as authorized by the Act of Congress of March 1, 1912 and up to the time of the filing of this suit, the said land has not been laid out for a roadway, sidewalk or parking space, nor has it been graded, paved or otherwise improved for highway purposes, nor has any specific appropriation been made by Congress therefor. During the year 1924, to wit, March 17, 1924 the District of Columbia laid and completed a cement side-

walk and curb across the east end of the condemned tract, being the west sidewalk and curb of 19th Street, Northwest at that point, the said sidewalk and curb constituting an effective obstruction to any vehicular traffic over the condemned land. Lamont Street east of this point is open for vehicle and pedestrian traffic, being paved, graded, laid out with roadway, sidewalks, curbing and parking spaces and was so physically improved prior to the institution of the condemnation proceeding herein. About twenty-four thousand square feet (24,000) of ground constitute [fol. 8] the area of the property condemned under the Act of Congress approved March 1, 1912 (37 Stat. 71) aforesaid, the value thereof plus the costs of the condemnation proceeding for the extension of Lamont Street, authorized hereunder amounted to Fourteen thousand two hundred and one dollars and twenty-six cents ($14,201.26) of which sum the two hundred dollars ($200) involved in this action was assessed against plaintiff's land by way of benefits.

No official action has been taken by the Commissioners, or by Congress, looking to the abandonment of the title to said land or of the right of defendant to physically improve it since its acquisition through the condemnation proceedings, District Court No. 1040, which are and were considered at the hearing of this cause and are made a part of this Bill of Exceptions by reference although Lamont Street, as identified in said condemnation proceeding, has not been extended through Squares 2604 and 2605 as an improved street. The following letter, considered at the trial of this cause on behalf of the plaintiff, although not binding on defendant as an admission was introduced to establish the plaintiffs first knowledge of the intention of the defendant to abandon, or that it had abandoned the purpose of the aforesaid condemnation proceedings, as claimed by the plaintiff, over defendant's objection and to the overruling of which defendant was allowed an exception.

January 29, 1926.

"Mr. Paul V. Rogers, Counsellor at Law, Evans Building, Washington, D. C.

DEAR SIR: Receipt is acknowledged of your letter of January 7, 1926, in which you state that you represent several taxpayers, and particularly Georgiana K. Thompson, with

reference to certain assessments made under proceedings for the extension of Lamont Street, N. W., as authorized by the Act of Congress approved March 1, 1912. You further state that it appears that the District has now abandoned the project for the extension of this street, and you have advised your clients that under the circumstances the retention by the District of the benefits so assessed and [fol. 9] paid was improper and claim should be made for the refund thereof.

The official files of the Engineer Department indicate that it was never the intention to open Lamont Street between Squares 2604 and 2605 to vehicular traffic, because of the excessive grade. Moreover, it appears that the principal reason for condemnation of the land was to preserve the vista to the Zoological Park and to provide access to the park. The record also shows that it was the intention to treat this street with terraces and steps.

The assessments for benefits in this case were made under a formal condemnation proceeding, and the verdict of the jury was duly ratified and confirmed by the Court. Therefore, the assessments, from our consideration of the matter, were legally made, and are legally payable. The only condition under which a refund of the payment made to the District of Columbia can be made is where the facts show the payment to have been made in error. This condition is not present in the matter of the benefit assessments paid under the Lamont Street proceedings.

You are advised that an application for such refunds will not be entertained by this office.

Very truly yours, (Signed) D. J. Donovan. D. J. Donovan, Auditor of the District of Columbia.

DJD:w.

but not binding as to the District.

O. K. as to evidence of signature. E. W. Thomas, Asst. C. C."

Whereupon the cause coming on to be heard before James A. Cobb, Esquire, one of the Judges of the Municipal Court on July 21, 1927 objection was made by defendant that the Municipal Court was without jurisdiction in the premises of the cause of action and/or the parties thereto and that more than three years had elapsed since any right of

action had accrued under the law providing for collection of special assessments as provided in 491*j* of the Code of Law for the District of Columbia and for the redemption of [fol. 10] plaintiff's property as set forth in defendant's affidavit of defense, which objections were then and there overruled, to which rulings of the Court, defendant by its counsel in open Court then and there noted exceptions on those matters of law, said exceptions being then and there allowed by the Court.

Whereupon the said Judge of the Municipal Court, on September 13, 1927, after hearing argument on the merits of the case rendered a judgment in favor of the plaintiff for the said sum of $200 to which judgment the defendant by its counsel in open Court noted exception to the matters of law involved, and made known its intention of applying to the Court of Appeals of the District of Columbia for a writ of error.

Whereupon, said writ of error having been petitioned for and the same having been duly allowed, the defendant, by its counsel comes now and prays the Court to sign this, its Bill of Exceptions, and the same is signed, settled and sealed, now for then, and made a part of the record in this cause this 23rd day of December, 1927.

James A. Cobb, Judge Municipal Court.

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IN MUNICIPAL COURT OF DISTRICT OF COLUMBIA

WRIT OF ERROR

United States of America, ss:

The President of the United States to the Honorable James A. Cobb, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between Georgiana Thompson, Plaintiff, and The District of Columbia, Defendant, No. 152,973, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment [fol. 11] be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable George E. Martin, Chief Justice of the said Court of Appeals, the 28th day of September, in the year of our Lord one thousand nine hundred and twenty-seven.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

Allowed by Josiah A. Van Orsdel, Associate Justice of the Court of Appeals of the District of Columbia.

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In Municipal Court of District of Columbia

Assignment of Errors—Filed December 29, 1927

During the trial the Court committed errors as follows:

1. The Court erred in overruling defendant's plea that jurisdiction of the Court over the cause of action as set forth in the declaration herein, or of the parties therein.

2. The Court erred in overruling defendant's plea that more than three years had elapsed since any right of action had accrued under the provisions of Section 491*j* of the Code of Laws for the District of Columbia relating to the collection of benefits on land acquired by condemnation.

3. The Court erred in overrling defendant's plea that more than three years had elapsed since the payment of the special assessment by plaintiff redeeming her land from [fol. 12] sale for nonpayment of benefits assessed in a condemnation case.

4. The Court erred in holding that defendant had abandoned the purpose for which the special assessment (for benefits) was paid.

5. The Court erred in holding that the physical improvement of Lamont Street, as acquired under the authority of the Act of Congress approved March 1, 1912 (37 Stats. 71), entitled "An Act to authorize the extension of Lamont Street, Northwest, in the District of Columbia," was contemplated, thereby.

6. The Court erred in holding that the physical improvement of Lamont Street as acquired under the above authority by condemnation through confirmation by the Supreme Court of the District of Columbia of a verdict of a jury in District Court No. 1040, was obligatory upon defendant.

7. The Court erred in holding that the defendant was legally bound to physically improve Lamont Street so acquired, by accepting payment of the Assessment for benefits as a result of said condemnation case.

8. The Court erred in holding that a quasi-contractual relationship existed between plaintiff and defendant to the end that Lamont Street should be physically improved.

9. The Court erred in entering judgment in favor of the defendant.

(S.) William W. Bride, Edward W. Thomas, Attorneys for Defendant.

Served copy of above:

(S.) Paul V. Rogers, W. E. Furey, Attorneys for Plaintiff.

* * * * * * *

IN MUNICIPAL COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed December 29, 1927

The Clerk of the Municipal Court in making up the Record in the above entitled case will include the following:

1. The declaration.
2. The Amended Plea to the jurisdiction.

[fol. 13] 3. The affidavit of defense.

4. The judgment of the Court.
5. The Bill of Exceptions.
6. The Assignment of errors.
7. This Designation.

William W. Bride, Edward W. Thomas, Attorneys for Defendant.

Served copy of above:

W. E. Furey, Paul V. Rogers, Attorneys for Plaintiff.

Clerk's certificate to foregoing transcript omitted in printing.

Friday, November 9th, A. D. 1928.

* * * * * * *

No. 4699

DISTRICT OF COLUMBIA, Plaintiff in Error,

vs.

GEORGIANA THOMPSON

The argument in the above entitled cause was commenced by Mr. E. W. Thomas, attorney for the plaintiff in error, and was continued by Mr. W. E. Fury, attorney for the defendant in error, and was concluded by Mr. E. W. Thomas, attorney for the plaintiff in error.

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IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 4699

DISTRICT OF COLUMBIA, Plaintiff in Error,

vs.

GEORGIANA THOMPSON, Defendant in Error

Writ of Error to the Municipal Court

(Before Martin, Chief Justice, and Robb and Van Orsdel, Associate Justices)

OPINION

Mr. Justice ROBB delivered the Opinion of the Court:

The Act of March 1, 1912 (37 Stat. 71), authorized and directed the Commissioners of the District of Columbia "to institute in the supreme court of the District of Columbia a proceeding in rem to condemn the land that may be necessary to extend Lamont Street northwest through squares numbered twenty-six hundred and four and twenty-six hundred and five, with a width of ninety feet, said extension to be a direct prolongation of Lamont Street as now existing

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east of Nineteenth Street." The Act further provided that the entire amount found to be due and awarded by the jury as damages for and in respect of the land to be condemned, plus the costs and expenses of the proceeding, should "be assessed by the jury as benefits."

Pursuant to the provisions of this Act, proceedings were instituted which resulted in the condemnation of land necessary for the extension of Lamont Street. Damages were awarded in the sum of $13,737.48, and costs of $463.78, making a total of $14,201.26, which sum was assessed as benefits against adjacent property in abutting squares 2602, 2603, 2604, 2605, 2606, and 2607. Against defendant-in-error's lot, Lot 101 in Square 2603, there was assessed $200 as the amount of her proportionate share of benefits. This verdict was confirmed by the Court on February 10, 1913, and the amount assessed against defendant-in-error subsequently was paid.

On January 7, 1926, defendant-in-error, through her counsel, in a written communication demanded of the District of Columbia the return of the assessment paid, on the ground that the District had abandoned the project for the extension of Lamont Street as contemplated by the Act of March 1, 1912. The reply to this communication was dated January 29, 1926, was signed by the Auditor of the District of Columbia, and contained the following statement: "The official files of the Engineer Department indicate that it was never the intention to open Lamont Street between Squares 2604 and 2605 to vehicular traffic, because of the excessive grade." The communication further stated that the assessments for benefits "were made under a formal condemnation proceeding, and the verdict of the jury was duly ratified and confirmed by the Court. Therefore, the assessments, from our consideration of the matter, were legally made, and are legally payable. The only condition under which a refund of the payment made to the District of Columbia can be made is where the facts show the payment to have been made in error. This condition is not present in the matter of the benefit assessments paid under the Lamont Street proceedings."

Thereafter, on June 22, 1927, defendant-in-error filed suit in the court below for the recovery of the assessment. Thereupon, the plaintiff-in-error, through its Collector of

Taxes, interposed an affidavit of defense based upon substantially the same grounds set forth in the Auditor's letter of January 29, 1926, and in addition the statute of limitations.

At the trial the plaintiff-in-error contended that the Municipal Court was without jurisdiction and that the statute of limitations had intervened.

The bill of exceptions contains the following: "Since the ratification of the verdict in the afore-mentioned condemnation case and since the acquisition of the land as authorized by the Act of Congress of March 1, 1912 and up to the time of the filing of this suit, the said land has not been laid out for a roadway, sidewalk or parking space, nor has it been graded, paved or otherwise improved for highway purposes, nor has any specific appropriation been made by Congress therefor. During the year 1924, to wit, March 17, 1924, the District of Columbia laid and completed a cement sidewalk and curb across the east end of the condemned tract, being the west sidewalk and curb of 19th Street, Northwest, at that point, the said sidewalk and curb constituting an effective obstruction to any vehicular traffic over the condemned land. * * * No official action has been taken by the Commissioners, or by Congress, looking to the abandonment of the title to said land or of the right of defendant to physically improve it since its acquisition through the condemnation proceedings."

Judgment was for the defendant-in-error, and the writ of error followed.

The assignments of error are as follows: First, want of jurisdiction. Second, the statute of limitations. Third, that the court erred in holding that the plaintiff-in-error had abandoned the purpose for which the special assessment for benefits was paid. Fourth, that "the court erred in holding that the physical improvement of Lamont Street, as acquired under the authority of the Act of Congress approved March 1, 1912 (37 Stats. 71), entitled 'An Act to authorize the extension of Lamont Street, Northwest, in the District of Columbia,' was contemplated thereby"; or that the District of Columbia "was legally bound to physically improve Lamont Street so acquired, by accepting payment of the Assessment for benefits as a result of said condemnation case."

The Act of March 1, 1912 (37 Stat. 71), authorized the Commissioners to condemn the land necessary to extend Lamont Street through squares 2604 and 2605, "with a width of ninety feet, said extension to be a direct prolongation of Lamont Street as now existing east of Nineteenth Street."

In Washington R. & E. Co. v. Newman, 41 App. D. C. 439, 445, involving a condemnation proceeding, the trial court had instructed the jury that, in assessing benefits against the properties to be benefited, it should take into consideration "the benefits and advantages they may severally receive from the said extension of the said street. By the extension of the street the jury are to understand its establishment, laying out and completion for all of the ordinary purposes of a public thoroughfare." Mr. Justice Van Orsdel, speaking for this Court, said: "This is assigned as error by defendant, on the ground that it permitted the jury to take into consideration future improvements. The benefits were to accrue from the opening of a street, not from an unimproved strip of land. The object in laying out and opening this street was to make it a thoroughfare for all the ordinary uses of a street, as the term 'street' is understood when used in comparison with the manner in which surrounding streets are constructed and used, not taking into consideration future uses to which the street may be subjected, or unforeseen improvements which may result from its construction. This form of instruction has been approved in a number of cases where the language of the act was substantially the same as here. Columbia Heights Realty Co. v. Macfarland, 31 App. D. C. 112, 217 U. S. 547, 54 L. ed. 877, 30 Sup. Ct. Rep. 581, 19 Ann. Cas. 854; American Security & T. Co. v. Rudolph, 38 App. D. C. 32."

It is apparent, therefore, that the basis for the assessments for benefits in this case was that the condemned land was to be opened as "a direct prolongation of Lamont Street" so as "to make it a thoroughfare for all the ordinary uses of a street." In other words, "the benefits were to accrue from the opening of a street, not from an unimproved strip of land." On no other theory could an assessment for special benefits be sustained. The acquisition by the municipality of land for an extension of a public park

results in general benefit to the public, and the cost of the extension should be borne by the public.

The first question for consideration is whether the municipality may retain money collected as special benefits to accrue from the opening of a street, without incurring any legal obligation to open it.

In Bradford v. City of Chicago, 25 Ill. 349, a suit to recover back moneys paid under special assessment, it was ruled that where a street is not opened in a reasonable time the moneys paid as assessments for benefits may be recovered back in assumpsit, on the theory that the consideration has wholly failed. The Court said: "In projecting this improvement by the city, and raising money by condemning property supposed to be benefited by the improvement, the city undertook that they would proceed according to law in making the assessments, and would devote the money raised to the completion of the undertaking, in a reasonable time. It was on this undertaking the plaintiff, voluntarily, we will say, paid his money. He trusted to the good faith, intelligence and integrity of the city officials, that by no fault, misconduct or miscarriage of their own, the work should be unreasonably delayed; that the improvement should be made in a reasonable time, and fully carried out. The city has failed to do it, and has given, and can give no assurance whatever that the improvement shall be made. The plaintiff may well contend, that he has paid his money on a consideration which has failed—that he has acquiesced in no delay, and that he ought to have his money restored to him, and which he demanded one year before he commenced his suit."

In Valentine v. City of St. Paul, 34 Minn. 446, the Court said: "The effect of the abandonment by the city of the project of 'extending and opening' the proposed street for and on account of which, and which only, the assessment was made, is that the consideration of the assessment has wholly failed. So that the city stands in the position of holding in its treasury money collected from the plaintiff which it has no right in equity, good conscience, or common honesty to retain, because the purpose for which it was collected has been completely abandoned. In such circumstances no statute is required to impose upon the city a legal obligation to make restitution. An action lies as at common law for

money had and received." See also McConville v. City of St. Paul, 75 Minn. 383; City of San Antonio v. Peters, 40 S. W. 827. We are in accord with the doctrine announced in these decisions.

The District of Columbia is a municipal corporation (United States v. Cella, 37 App. D. C. 423; District of Columbia v. Tyrell, 41 App. D. C. 463), and its responsibility in the premises does not differ from that of a private person. Valentine v. City of St. Paul, 34 Minn. 446, 448; Pimental v. City of San Francisco, 21 Cal. 352; Marsh v. Fulton Co., 10 Wall. 676.

The next question is whether the action was barred by the statute of limitations. The condemnation proceedings were regular in form and resulted in the acquisition by the municipality of the condemned land, the title to which it still holds. It is manifest, therefore, that the District at any time subsequent to the confirmation of the verdict of the jury might have opened this street. The fact that in 1924 it "laid and completed a cement sidewalk and curb across the east end of the condemned tract," while indicating a purpose to delay the actual opening of the street, was not conclusive of the intention on the part of the municipality to abandon the project. The first definite act or declaration on the part of the District came from the Auditor in the communication of January 29, 1926, in response to a letter from the defendant-in-error demanding of the District a refund. The position assumed by the Auditor, in effect, is the position now taken by the District, because it insists that the Act of March 1, 1912, did not contemplate "the physical improvement of Lamont Street," and that the District was not "legally bound to physically improve Lamont Street so acquired."

In McConville v. City of St. Paul, 75 Minn. 383, the Court said: "The city, by judicial proceedings, compelled him (the plaintiff) to pay to it the full amount of the assessment; and, with commendable forbearance, he waited nearly six years for the city to complete its work after obtaining his money in August, 1892, which it keeps without the slightest evidence of its intent to complete its work of grading and improving the street named. If it intends to complete this work, it should do so or say so."

In the present case, the first definite statement of the District's interpretation of the condemnation Act and of the District's purpose not to open the street was in the communication of January 29, 1926. This action was brought on June 22, 1927, and was, therefore, within the statute of limitations, which provides that such actions shall be brought within three years.

The Municipal Court had jurisdiction of the parties and of the subject matter.

Our conclusion is that the judgment below was right and it is, therefore, affirmed, with costs.

Affirmed.

Endorsed: No. 4699. District of Columbia, Plaintiff in Error, vs. Georgiana Thompson. Opinion of the Court per Mr. Justice Robb. Court of Appeals. District of Columbia. Filed January 7, 1929. Henry W. Hodges, Clerk.

---

Monday, January 7th, A. D. 1929.

* * * * * * *

No. 4699, January Term, 1929

DISTRICT OF COLUMBIA, Plaintiff in Error,

vs.

GEORGIANA THOMPSON

In Error to the Municipal Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Municipal Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court in this cause be and the same is hereby affirmed with costs.

Per Mr. Justice Robb, January 7, 1929.

Memorandum: January 24, 1929.—Petition for rehearing or stay of mandate filed.

Memorandum: January 26, 1929.—Petition for rehearing denied; mandate stayed under Rule 24.

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No. 4699

District of Columbia, Plaintiff in Error,

vs.

Georgiana Thompson, Defendant in Error

Designation of Record

The Clerk, in preparation of the record on petition for Certiorari to the Supreme Court of the United States, will include the following:

1. Transcript of Record.
2. Argument of Cause.
3. Opinion.
4. Judgment.
5. This Designation.

William W. Bride, Alex. H. Bell, Jr., Attorneys for Plaintiff in Error.

Endorsed: No. 4699. District of Columbia, Plaintiff in Error, vs. Georgiana Thompson. Designation of Record. Court of Appeals. District of Columbia. Filed February 15, 1929. Henry W. Hodges, Clerk.

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Court of Appeals of the District of Columbia

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 27, inclusive, constitute a true copy of the Transcript of the Record and proceedings of said Court of Appeals per designation of counsel in the case of District of Columbia, Plaintiff in Error, vs. Georgiana Thompson, No. 4699, January

Term, 1929, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 15th day of February, A. D. 1929.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal, Court of Appeals, District of Columbia.)

(6075)

[fol. 29] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 11, 1929

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,032. Court of Appeals, District of Columbia. Term No. 723. District of Columbia, petitioner, vs. Georgiana Thompson. Petition for writ of certiorari and exhibit thereto. Filed February 26th, 1929. File No. 34,032.

FILE COPY

Office Supreme Court
FILED
FEB 26
CHARLES ELMORE

IN THE

# Supreme Court of The United States

February Term, 1929.

No. [redacted] 44

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,
*Petitioner,*

vs.

GEORGIANA THOMPSON,
*Defendant.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

WILLIAM W. BRIDE,
*Corporation Counsel,*

A. H. BELL, Jr.,
*Assistant Corporation Counsel,*
*Attorneys for Petitioner.*

HAYWORTH PRINTING COMPANY - WASHINGTON D C

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IN THE

# Supreme Court of The United States

**February Term, 1929.**

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## No.

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DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,
*Petitioner,*

vs.

GEORGIANA THOMPSON,
*Defendant.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.**

---

TO THE HONORABLE, *the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Comes now the District of Columbia, a municipal corporation, by its Commissioners, Proctor L. Dougherty, Sidney F. Taliaferro and William B. Ladue, and shows to the Court as follows: On March 1, 1912, there was approved an Act of Congress entitled "An Act to authorize the extension of Lamont Street, Northwest, in the District of Columbia." In pursuance of the authority of said statute, the Commissioners of the District of Columbia instituted con-

demnation proceedings in the Supreme Court of the District of Columbia, such proceedings being known as District Court Cause No. 1040, "In re: The extension of Lamont Street, Northwest." In said condemnation proceedings the jury allowed as the value of the land condemned, known as a portion of square 2605 and square 2604, the sum of $13,737.48; assessed the costs of said proceedings at $463.78, making a total of damages and costs $14,201.26, and, under the provisions of said Act, assessed said last mentioned sum as benefits against the adjacent property in the abutting squares 2602, 2603, 2604, 2605, 2606 and 2607.

The defendant named above, Georgiana Thompson, was the owner of lot 101, square 2603, and her property was assessed $200.00 as the amount of its proportionate part of said benefits. The verdict of the condemnation jury was ratified and confirmed, by the Court, on February 3, 1913. Subsequent thereto, on March 17, 1921, defendant Thompson paid said assessment to the Collector of Taxes of the District of Columbia.

On June 22, 1927, in the Municipal Court of the District of Columbia, said defendant filed a declaration in assumpsit, alleging, in substance, that notwithstanding the authorization of the above mentioned statute, the District of Columbia had wholly failed to extend Lamont Street through said squares; that the District of Columbia had wholly abandoned, renunciated and repudiated the purpose of said condemnation; that demand had been made upon said District for a refund of the $200.00 so paid, but the same had not been refunded.

To said declaration the District of Columbia filed, first, a plea to the jurisdiction, and, second, an affidavit of defense. The plea stated, in substance, that the supposed cause of action did not arise out of any contract, express or implied, whereby any debt was due plaintiff (defendant here), nor did the amount claimed by plaintiff arise out of damages due from the same, or from any wrong or injury to the plaintiff or her property. The affidavit of defense filed by said District admitted the condemnation proceedings and

the assessment for $200.00 growing therefrom, but set forth that although it protested the necessity so to do, the District denied it had abandoned the purpose of said condemnation. Said affidavit of defense further stated that more than three years had elapsed since the time when the right to maintain said action, if any, accrued.

Trial was had, without jury, upon the above pleadings, at which certain evidence was introduced by defendant Thompson, to the effect that since the ratification of the verdict in the condemnation case and to the time of filing said suit, the land condemned had not been laid out into roadway, sidewalk or parking space, nor had it been graded, paved or otherwise physically improved for highway purposes, nor had any special appropriation been made by Congress for such physical improvement. That in the year 1924 the District of Columbia laid and completed a cement sidewalk and curb across the east end of the condemned tract, the said sidewalk and curb constituting an effective obstruction to any vehicular traffic over the condemned land. *That no official action had been taken by the Commissioners of the District of Columbia or by Congress looking to the abandonment of the title to said land or to the abandonment of the right to physically improve said street.* Defendant Thompson introduced in evidence, over objection and exception of the District of Columbia, the following letter:

"January 29, 1926.

"Mr. Paul V. Rogers,
Counsellor at Law, Evans Building,
Washington, D. C.

Dear Sir:

Receipt is acknowledged of your letter of January 7, 1926, in which you state that you represent several taxpayers, and particularly Georgiana K. Thompson, with reference to certain assessments made under proceedings for the extension of Lamont Street, N. W., as authorized by the Act of Congress approved March 1, 1912. You further state that it appears that the District has now abandoned the project for the exten-

sion of this street, and you have advised your clients that under the circumstances the retention by the District of the benefits so assessed and paid was improper and claim should be made for the refund thereof.

The official files of the Engineer Department indicate that it was never the intention to open Lamont Street between Squares 2604 and 2605 to vehicular traffic, because of the excessive grade. Moreover, it appears that the principal reason for condemnation of the land was to preserve the vista to the Zoological Park and to provide access to the park. The record also shows that it was the intention to treat this street with terraces and steps.

The assessments for benefits in this case were made under a formal condemnation proceeding, and the verdict of the jury was duly ratified and confirmed by the Court. Therefore, the assessments from our consideration of the matter, were legally made, and are legally payable. The only condition under which a refund of the payment made to the District of Columbia can be made is where the facts show the payment to have been made in error. This condition is not present in the matter of the benefit assessments paid under the Lamont Street proceedings.

You are advised that an application for such refunds will not be entertained by this office.

Very truly yours,

(Signed) D. J. DONOVAN,
D. J. DONOVAN,
*Auditor of the District of Columbia.*"

Whereupon judgment was entered for defendant Thompson, plaintiff below, for the amount claimed.

After the entry of said judgment the District of Columbia petitioned the Court of Appeals of said District for a writ of error to the Municipal Court to review said decision. The Court of Appeals granted the petition, the cause was

argued, and on January 7, 1929 said Court of Appeals rendered its decision affirming the judgment of the Municipal Court. In accordance with the rules of the Court of Appeals a petition for rehearing was filed, which alleged, among other things, that said Court had based its decision upon an erroneous assumption of fact, in that said District had not abandoned, and did not intend to abandon, the physical improvement of said street, and upon the erroneous conclusion of law that the Commissioners had the power to abandon such project when they had been not only authorized but *directed* by Congress to carry it out; moreover, that the letter of the Auditor of the District, was not, as a matter of fact, the act of the Commissioners, and could not be, as a matter of law, binding upon them. The petition for a rehearing was denied.

Your petitioner urges that strong reasons exist for the granting of its petition in that said Court of Appeals has held, in effect, that a subordinate official of the Municipality may bind the District of Columbia; that the Commissioners of the District of Columbia have the power to abandon a condemnation proceeding authorized and *directed* by a special Act of Congress; that a contractual relation and obligation exists upon the District of Columbia as the outgrowth of the assessments for benefits in condemnation proceedings. For a further reason for the granting of said petition, your petitioner states that although the cause before this Court involves only the sum of $200.00, there have been filed in the Municipal Court and the Supreme Court of the District of Columbia suits to recover practically the entire amount assessed as benefits in the Lamont Street condemnation case, aggregating approximately $14,000.00.

Your petitioner, therefore, prays that the writ of certiorari may issue out of this Honorable Court, directed to the said Court of Appeals, demanding said Court to certify and send to this Court, at a time certain to be herein designated, a full and complete transcript of all the proceedings in said Court of Appeals in said case, entitled therein,

"District of Columbia, Appellant, vs. Georgiana Thompson, Appellee," No. 4699, to the end that said case may be reviewed and determined by this Court.

Proctor L. Dougherty

William W. Trew

Sidney F. Taliaferro

Alex. L. Bell, Jr.

*Attorneys for Petitioner.*

W. B. Ladue

*Commissioners of the District of Columbia.*

DISTRICT OF COLUMBIA, ss:

Proctor L. Dougherty, Sidney F. Taliaferro and William B. Ladue, being first duly sworn, depose and say that they have read the foregoing petition by them subscribed and know the contents thereof; that the matters and things therein stated upon personal knowledge are true and those stated upon information and belief, they believe to be true.

Proctor L. Dougherty

Sidney F. Taliaferro

W. B. Ladue

*Commissioners of the District of Columbia.*

Subscribed and sworn to before me this 14th day of February, 1929.

Adam A. Giel

*Notary Public, D. C.*

[SEAL]

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I. THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA HAVE NO AUTHORITY TO ABANDON A PROJECT WHICH CONGRESS HAS AUTHORIZED AND DIRECTED TO BE CARRIED OUT.

The Act of Congress approved March 1, 1912 provided:

"An Act to Authorize the Extension of Lamont Street Northwest, in the District of Columbia.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That under and in accordance with the provisions of subchapter one of chapter fifteen of the Code of Law for the District of Columbia, within six months after the passage of this Act, the Commissioners of the District of Columbia be and they are hereby authorized and directed to institute in the Supreme Court of the District of Columbia a proceeding in rem to condemn the land that may be necessary to extend Lamont Street northwest through squares numbered twenty-six hundred and four and twenty-six hundred and five, with a width of ninety feet, *said extension to be a direct prolongation of Lamont Street as now existing east of Nineteenth Street.* Provided, however, That the entire amount found to be due and awarded by the jury in said proceeding as damages for and in respect of the land to be condemned for said extension, plus the costs and expenses of said proceeding, shall be assessed by the jury as benefits.

Sec. 2. That there is hereby appropriated, out of the revennes of the District of Columbia, an amount sufficient to pay the necessary costs and expenses of the said condemnation proceeding taken pursuant hereto, and for the payments of the amounts awarded as damages, to be repaid to the District of Columbia from the assessments for benefits and covered into the Treasury to the credit of the revenues of the District of Columbia.

Approved, March 1, 1912." (Italics ours.)

It has been held repeatedly by this Honorable Court and by the Court of Appeals of the District of Columbia that the Commissioners of said District are merely ministerial officers deriving their powers solely through the special grant of power by Congress. We submit, therefore, that the Honorable Court of Appeals in the present case has been inconsistent, not only with its own prior decisions, but has failed, as well, to follow the opinions of the Supreme Court of the United States.

A legal controversy closely approaching in similarity the situation presented by the case now before the Court is exemplified by the case of Walter *vs.* MacFarland, 27 Appeals D. C., 182. In that case the question before the Court was whether the Commissioners of the District of Columbia had the power to make changes in the established public streets of the City of Washington. The language of the opinion is so pertinent to the present case that the indulgence of the Court is asked to quote at some length from the decision. The Court said:

> "Municipal governments exist and exercise authority through legislative sanction. For convenience of administration they are created as agents of government for certain local purposes, and have such powers only as are expressly conferred or may be fairly and reasonably implied as necessary to carry into effect such as have been expressly granted. aBrnett *vs.* Denison, 145 U. S. 135, 139, 36 L. ed. 652, 653, 12 Sup. Ct. Rep. 819. And while the laying out, opening, and improvement of streets in towns and cities are matters of peculiar fitness for municipal regulation and control, powers relating thereto must be similarly construed. • • •
>
> "The municipal organization of the District of Columbia is of a peculiar character. There is no general organic law covering all of the ordinary powers usually conferred in the creation of municipal corporations throughout the several States of the Union,—no formal municipal charter, so to speak.
>
> "The commissioners, though vested from time to time with the power to make important regulations,

are ministerial officers. There is no special municipal council or legislative body, as was the case under the preceding form of municipal government. Congress possesses and has retained the powers of a local legislature. Sometimes it enacts special laws relating to local affairs, and sometimes it delegates to the commissioners extensive powers to make rules and regulations respecting specified subjects. The commissioners have no authority to raise revenues for the support of the local government, and those raised by the direct authority of Congress are not turned over to them for appropriation and expenditure at discretion.

"The title in fee to all streets and public reservations in the city of Washington is vested in the United States, and the public parks have been specially intrusted to the care and supervision of one of the departments of the general government. Congress has specially provided, from time to time, for the improvement and extension of the old, established streets, as well as for the opening of new streets, and the changing and closing of others. While such works are provided to be done under the general supervision of the commissioners, their discretion in all matters, including expenditures, is limited by the authorizing acts, and the special appropriations for the purpose. The commissioners cannot close streets; they cannot authorize private encroachments, occupations, or obstructions; they are not permitted to authorize the construction of a street-car line in them."

It will be noted that this case specifically decided "the commissioners cannot close streets." The question involved in the instant case is whether or not the Commissioners could abandon Lamont Street in view of the express provision of Congress that land be condemned for the purpose of extending Lamont Street, "said extension to be a direct prolongation of Lamont Street as now existing east of Nineteenth Street."

From this decision, petition was made to this Honorable Court for the writ of certiorari. The petition was denied.

Again, in the case of Myers *vs.* D. C., 25 Appeals D. C.,

132, the same doctrine is enunciated. Moreover, in the Myers case the Court of Appeals quoted from the opinion of the Supreme Court of the United States handed down in D. C. *vs.* Bailey, 171 U. S. 161, basing the opinion entirely upon what this Court held in the Bailey case. The significant expression which the Court of Appeals selected from the Bailey case for quotation was in the following words:

> "These officers are without general power to contract debts or to adjust and pay the same; that, on the contrary, the statutes expressly deprive them of such power, and limit the scope of their authority to the mere execution of contracts previously sanctioned by Congress, or which they are authorized to make by express statutory authority. The necessary operation of these provisions of the statutes is to cause the District commissioners to be merely administrative officers, with ministerial powers only. The sum of the municipal powers of the District of Columbia is neither vested in nor exercised by the District commissioners. They are, on the contrary, vested in the Congress of the United States, acting *pro hac vice* as the legislative body of the District, and the commissioners of the District discharge the functions of administrative officials."

Congress having once directed the Commissioners to extend Lamont Street, it is absolutely beyond *their* power to alter such direction or disregard that command.

Therefore, we respectfully urge that in the case now under consideration, the Court of Appeals has failed to apply the proper ruling to the facts before it.

## II. A SUBORDINATE OFFICER OF THE MUNICIPALITY CANNOT BIND THE DISTRICT OF COLUMBIA.

We feel, that having demonstrated the inability of the District Commissioners to transcend their authorized powers by repudiating the plain direction of Congress; *a fortiori*, one of the subordinate officials of the Municipality

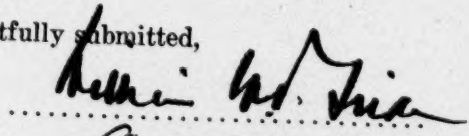
cannot do so. However, as the Court of Appeals seems to assume that the opening of Lamont Street had been abandoned, because a letter was written by the District Auditor to defendant herein to that effect, the following authorities are respectfully called to the attention of the Court.

In the case of Brown vs. D. C., 127 U. S., 579, the plaintiff sued to recover damages for breach of contract. It appeared that the secretary of the board of public works had, by letter, accepted an offer advanced by plaintiff. The Court held that no contract had been made and that it would require the concerted action of a majority of the members of said board to make a valid contract.

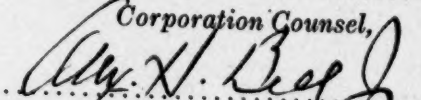
In the case of Stone vs. Bank, 174 U. S., 412, this Court held that a city attorney whose duties were to give legal advice to the city officers and boards and to prosecute and defend suits for the city, had no power to bind the city by an agreement with certain banks that the latter should abide by the results of certain test cases.

It would appear unnecessary to cite further cases upon the question of the power of the District Commissioners, or the scope of the duties of subordinate officers, in view of the express declarations thereon by this Honorable Court as disclosed herein.

Respectfully submitted,



*Corporation Counsel,*



*Assistant Corporation Counsel,*
*Attorneys for Petitioner.*

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CHARLES ELMORE CROP
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1929.**

---

**No. [redacted] 44.**

---

DISTRICT OF COLUMBIA, PETITIONER,

*vs.*

GEORGIANA THOMPSON.

---

## BRIEF ON BEHALF OF PETITIONER.

---

WILLIAM W. BRIDE,
*Corporation Counsel;*
ALEXANDER H. BELL, JR.,
*Assistant Corporation Counsel,*
*Attorneys for Petitioner.*

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IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1929.**

---

## No. 723

---

DISTRICT OF COLUMBIA, PETITIONER,

*vs.*

GEORGIANA THOMPSON.

---

## BRIEF ON BEHALF OF PETITIONER.

---

### Statement of Case.

An Act of Congress approved March 1, 1912 (37 Stat. 71), entitled "An Act to authorize the extension of Lamont Street, Northwest, in the District of Columbia," provided:

> "*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That under and in accordance with the provisions of subchapter

one of chapter fifteen of the Code of Law for the District of Columbia, within six months after the passage of this Act, the Commissioners of the District of Columbia be and they are hereby authorized and directed to institute in the Supreme Court of the District of Columbia a proceeding in rem to condemn the land that may be necessary to extend Lamont Street northwest through squares numbered twenty-six hundred and four and twenty-six hundred and five, with a width of ninety feet, said extension to be a direct prolongation of Lamont Street as now existing east of Nineteenth Street. *Provided, however,* That the entire amount found to be due and awarded by the jury in said proceeding as damages for and in respect of the land to be condemned for said extension, plus the costs and expenses of said proceeding, shall be assessed by the jury as benefits.

SEC. 2. That there is hereby appropriated, out of the revenues of the District of Columbia, an amount sufficient to pay the necessary costs and expenses of the said condemnation proceeding taken pursuant hereto, and for the payments of the amounts awarded as damages, to be repaid to the District of Columbia from the assessments for benefits and covered into the Treasury to the credit of the revenues of the District of Columbia.

Approved March 1, 1912."

Condemnation proceedings in the Supreme Court of the District of Columbia were had under the authority of said Act and the condemnation jury appointed in said cause duly returned its verdict, which was rati-

fied and confirmed by the court on February 3, 1913 (R., p. 5). By said verdict the jury allowed as the value of the land condemned, known as parts of Square 2605 and Square 2604, $13,737.48, and costs of $463.78, or a total of $14,201.26, such sum being assessed as benefits against the adjacent property in the abutting Squares 2602, 2603, 2604, 2605, 2606, and 2607. Respondent was the owner of Lot 101, Square 2603, which was assessed $200.00 as the amount of its proportionate share of such benefits. Said lot was sold for nonpayment of this assessment on March 17, 1921, but later redeemed from said sale by the payment of said sum of $200.00 and interest to the Collector of Taxes (R., p. 4).

On June 22, 1927, in the Municipal Court of the District of Columbia, said respondent filed a declaration in assumpsit, alleging, in substance, that notwithstanding the authorization of the above-mentioned statute, the District of Columbia had wholly failed to extend Lamont Street through said squares; that the District of Columbia had wholly abandoned, renounced and repudiated the purpose of said condemnation; that demand had been made upon said District for a refund of the $200.00 so paid, but the same had never been refunded (R., p. 1).

To said declaration the District of Columbia filed, first, a plea to the jurisdiction and, second, an affidavit of defense. The plea stated, in substance, that the supposed cause of action did not arise out of any contract, expressed or implied, whereby any debt was due plaintiff (respondent here), nor did the amount

claimed by plaintiff arise out of damages due from the same, or from any wrong or injury to the plaintiff or her property (R., pp. 2, 3). The affidavit of defense filed by the said District admitted the condemnation proceedings and the assessment for $200.00 growing therefrom, but set forth that although it protested the necessity so to do, the District denied it had abandoned the purpose of said condemnation. Said affidavit of defense further stated that more than three years had elapsed since the time when the right to maintain said action, if any, accrued. (R., pp. 3, 4).

Trial was had, without jury, upon the above pleadings, at which certain evidence was introduced by respondent Thompson to the effect that since the ratification of the verdict in the condemnation case and to the time of filing said suit the land condemned had not been laid out into roadway, sidewalk, or parking space, nor had it been graded, paved or otherwise physically improved for highway purposes, nor had any special appropriation been made by Congress for such physical improvement (R., pp. 5, 6). That in the year 1924 the District of Columbia laid and completed a cement sidewalk and curb across the east end of the condemned tract, the said sidewalk and curb constituting an effective obstruction to any vehicular traffic over the condemned land (R., pp. 6, 7). *That no official action had been taken by the Commissioners of the District of Columbia or by Congress looking to the abandonment of the title to said land or to the abandonment of the right to physically improve said street* (R., p. 7).

Respondent Thompson introduced in evidence, over objection and exception of the District of Columbia, the following letter:

JANUARY 29, 1926.

"Mr. Paul V. Rogers,
Counsellor at Law, Evans Building,
Washington, D. C.

DEAR SIR:

Receipt is acknowledged of your letter of January 7, 1926, in which you state that you represent several taxpayers, and particularly Georgiana K. Thompson, with reference to certain assessments made under proceedings for the extension of Lamont Street, N. W., as authorized by the Act of Congress approved March 1, 1912. You further state that it appears that the District has now abandoned the project for the extension of this street, and you have advised your clients that under the circumstances the retention by the District of the benefits so assessed and paid was improper and claim should be made for the refund thereof.

The official files of the Engineer Department indicate that it was never the intention to open Lamont Street between Squares 2604 and 2605 to vehicular traffic, because of the excessive grade. Moreover, it appears that the principal reason for condemnation of the land was to preserve the vista to the Zoological Park and to provide access to the park. The record also shows that it was the intention to treat this street with terraces and steps.

The assessments for benefits in this case were made under a formal condemnation proceeding, and the verdict of the jury was duly ratified and

confirmed by the Court. Therefore, the assessments from our consideration of the matter, were legally made, and are legally payable. The only condition under which a refund of the payment made to the District of Columbia can be made is where the facts show the payment to have been made in error. This condition is not present in the matter of the benefit assessments paid under the Lamont Street proceedings.

You are advised that an application for such refunds will not be entertained by this office.

Very truly yours,

(Signed) D. J. DONOVAN,
D. J. DONOVAN,
*Auditor of the District of Columbia.*

Whereupon judgment was entered for respondent, plaintiff below, for the amount claimed (R., p. 9).

After the entry of said judgment the Disrtict of Columbia petitioned the Court of Appeals of said District for a writ of error to the Municipal Court to review said decision. The Court of Appeals granted the petition, the cause was argued, and on January 7, 1929, said Court of Appeals rendered its decision (R., p. 13 *et seq.*), affirming the judgment of the Municipal Court. In accordance with the rules of the Court of Appeals a petition for rehearing was filed, which was denied.

The case is now before this Honorable Court by virtue of the granting of a writ of certiorari to the Court of Appeals of the District of Columbia (R., p. 23).

This cause is one of a series of suits now pending in the Municipal Court and the Supreme Court of the

District of Columbia which have been filed to recover practically the entire amount assessed as benefits in the Lamont Street condemnation case, aggregating approximately $14,000.00.

## Assignment of Errors.

The petitioner assigns for error in this case:

1. The ruling of the court below that the Municipal Court of the District of Columbia had jurisdiction over the cause of action or of the parties thereto.

2. The ruling of the court below that a letter of the Auditor of the District of Columbia constitutes admissible evidence of an intention on the part of petitioner to abandon a condemnation project authorized and directed to be carried out by a special Act of Congress.

3. The ruling of the court below, in substance, that defendant could, as a matter of law abandon, and had, as a matter of fact abandoned the extension of Lamont Street.

4. The ruling of the court below that the time for respondent to bring her action had not expired under the provisions of Section 1265 of the Code of Law for the District of Columbia.

## ARGUMENT.

### I.

### Jurisdiction of Municipal Court.

The jurisdiction of the Municipal Court is purely statutory and is set forth in the amendatory Act of

Congress approved March 3, 1921 (41 Stat. L. 1310), wherein it is provided that the Municipal Court "shall have exclusive jurisdiction in the following civil cases, * * * namely, in the classes of cases over which the Court has jurisdiction immediately prior to the passage of this Act * * *."

The Act of Congress of February 17, 1909 (35 Stat. L. 623), creating the Municipal Court provided:

> "The said Court and each member thereof shall exercise the same jurisdiction as vested in them as justices of the peace * * * and no more * * *."

Under Section 9 of the Code of Law for the District of Columbia the jurisdiction is limited to amounts "claimed to be due and debts or damages arising out of contracts, expressed or implied, or damages for wrongs or injuries to persons or property."

Petitioner denies any *personam* obligation to return the tax paid by respondent or that the declaration filed herein sets forth any facts upon which the Municipal Court might render a valid judgment. The liability imposed by the assessment was a legal one, free from duress or mistake, and arose from positive law not contractual in its nature. The assessment herein involved was a special levy and was a result of the plenary and absolute power of taxation of Congress over the District of Columbia and is an attribute of the sovereignty of Congress (Bauman *vs.* Ross, 167 U. S. 548). The District of Columbia, while having the right to sue and be sued, contract and be contracted with, and exercise other powers of a munici-

pal corporation, has no sovereign power, and its governing officials, the Commissioners of the District, are prohibited from making any contract not authorized by Congress. Section 3, paragraph 3, of the Act of Congress providing a permanent form of government for the District, approved June 11, 1878 (20 Stat. L. 102), expressly states:

> "But said Commissioners, in the exercise of such duties, powers of authority, shall make no contract, nor incur any obligation other than such contracts and obligations as are hereinafter provided for and shall be approved by Congress."

The assessment against respondent, being a result of the exercise of the taxing power and being admittedly lawfully imposed by respondent, has been collected as authorized by Congress under the authority of other sections of the Act last above quoted.

Respondent bases her claim upon the principle that there was a contractual relation between her and the District of Columbia. As the statute above quoted precludes the Commissioners of the District from making any contract other than those as shall be thereafter provided for and as shall be approved by Congress, there was no jurisdiction in the Municipal Court.

In the case of District of Columbia *vs.* Bailey, 171 U. S. 161, this Court held that an agreement to arbitrate not under rule of court or within the terms of a statute enacted for such purpose, was a contract, and that the Commissioners of the District of Columbia, under the Act above quoted, had not the power to so

bind the District. It will be observed that the Court of Appeals made no comment on this point other than to say (R., p. 20) that the Municipal Court had jurisdiction of the parties and of the subject-matter.

## II.

### The Statute of Limitations.

Section 1265 of the Code of Law for the District of Columbia provides:

> "No action shall be brought * * * upon any simple contract, express or implied * * * after three years from the time when the right to maintain any such action shall have accrued; * * *."

As the Municipal Court held, and was affirmed in its decision by the Court of Appeals, that a contractual relation existed between the parties to this suit that Lamont Street be physically improved, it becomes important to determine when such contract arose. If, as seems to be the case, respondent contends that the wording of the Act of Congress authorizing the extension of Lamont Street raises an express promise or order that it be done, then there can be no basis for a claim of an implied contract. Section 1 of the Act of March 1, 1912 (37 Stat. L. 71), authorized and directed the Commissioners of the District of Columbia, in accordance with Chapter 15 of the Code of Law for the District of Columbia, to institute within six months a proceeding *in rem* in the Supreme Court of the District—

> "To condemn the land that may be necessary to extend Lamont Street, Northwest, through squares numbered 2604, 2605, with a width of ninety feet, said extension to be a direct prolongation of Lamont Street as now existing east of Nineteenth Street."

Lamont Street east of Nineteenth Street was at that time graded and physically improved for street and traffic purposes.

By Section 491*j* of the Code of Law for the District, the tax here involved was collectible in five equal annual installments from and after sixty days after the confirmation of the verdict of the condemnation jury. The verdict having been ratified on February 3, 1913, it would necessarily follow that the present claimed right of respondent arose within the limit of three years thereafter, or on or before February 3, 1918, and none being brought within that period, the claim is barred.

If, on the other hand, the acceptance by the Collector of Taxes of the amount involved on March 15, 1923, constituted a new promise to pave and improve Lamont Street, the limitation had been exceeded by three months when the suit was filed in the Municipal Court on June 22, 1927.

## III.

### Abandonment of the Street As a Matter of Fact.

The argument in the Court below on behalf of respondent proceeded almost entirely upon the theory

that petitioner had in fact abandoned the extension of Lamont Street. The court below, in its opinion (R. p. 20), states:

> "In the present case, the first definite statement of the District's interpretation of the condemnation act and of the District's purpose not to open the street was in the communication of January 29, 1926."

The communication referred to was the letter of the District Auditor, *supra.*

In other words the only evidence before the Court, at any time, that the District of Columbia intended to abandon Lamont Street was the communication above referred to. If, then, this evidence was inadmissible as a matter of law to prove an intention to abandon, there was then no evidence either before the Municipal Court or the Court of Appeals to support a finding of fact that the District had abandoned said street. It will be noted that exception was taken by petitioner at the trial of this case to the admission in evidence of said letter (R., p. 7). If the Auditor of the District of Columbia had no power to bind the municipality, the letter should not have been admitted in evidence, because his action would be a nullity and the letter immaterial to the issues involved.

In the case of Brown *vs.* District of Columbia, 127 U. S. 579, the plaintiff sued to recover damages for breach of contract. It appeared that the Secretary of the Board of Public Works had, by letter, accepted an offer advanced by plaintiff to pave certain streets. This Court, in its opinion, said:

> "Numerous authorities are cited to show that the written acceptance by one party of a written proposal made to him by another party creates a contract of the same force and effect, as if formal articles of agreement had been written out and signed by said parties. The legal principle asserted is sound, but the fallacy of the argument lies in the assumption that the proposition of the pavement company was in fact submitted to the Board, and that the latter did in fact authorize the letter to be written by Secretary Johnson accepting the said proposition."

In the case of Stone *vs.* Bank of Commerce, 174 U. S. 412, the city attorney entered into a stipulation with certain banks that the latter should abide by the results of certain test cases. This Court held that the attorney's duties were to give legal advice to the city officials and boards and to prosecute and defend suits for the city, but that he had no power to bind the city by such an agreement.

It is important to note that the evidence discloses that no official action had been taken by the Commissioners, or by Congress, looking to the abandonment of the title to the condemned land or of the right of the District of Columbia to physically improve it since its acquisition by condemnation (R., p. 7). If, then, the Commissioners had taken no action indicating an intention to abandon Lamont Street, and the Commissioners can only act officially sitting as a Board (Act of Congress, December 24, 1890, 26 Stat. 1113; Washington Railway and Electric Company *vs.* Newman, 41 App. D. C. 443), it is difficult to see how the District

Auditor, himself only a subordinante official of the municipality, could, by the mere writing of a letter, furnish sufficient evidence to support a finding of fact on a matter which could only have been evidenced by an official act of the Commissioners themselves, sitting as a Board, assuming even that said Commissioners would have the power to take official action looking to the abandonment of the street in question.

Counsel for respondent state in their brief in the court below (p. 14, 15):

> "The duty to improve a tract of land condemned for street purposes is, we submit, in the nature of a legislative discretionary duty delegated by Congress to the Commissioners of the District of Columbia. However hard it may seem on the taxpayer no right vests in him by the delay of the Commissioners in the exercise of its discretionary determination. It is only when the Commissioners have, either exercised the discretionary power vested in them, or have expressed, by word or act, an intention not to exercise the discretionary power at all, that a right vests in the taxpayer."

Passing for a moment the question of whether the power delegated by Congress is discretionary, the record fails to disclose a single instance where the Commissioners "have expressed by word or action an intention not to exercise the power so delegated." On the contrary, as before stated, the record discloses that they have taken no action looking to the abandonment of the street (R. p. 7).

Moreover, in the petition for a rehearing filed in the Court of Appeals, petitioner stated that the court had

"arrived at an erroneous conclusion of fact as to the intention of the Commissioners to abandon the opening of said street. To support this contention, and to show that the matters set forth in the aforesaid letter of the Auditor of the District of Columbia did not constitute the facts as to petitioner's intention, the following official action of the Commissioners of the District of Columbia was taken on January 23, 1929:

> 'In regard to the matter of the improvement of Lamont Street between 19th Street and Adams Mill Road Northwest, I MOVE that the Commissioners assert their intention to open and improve this Street and that the Engineer Department present an estimate for grading this Street in the Budget estimates for the fiscal year 1931.
>
> APPROVED by the Commissioners of the District of Columbia, sitting as a Board, January 23, 1929.
>
> DANIEL E. GARGES,
> *Secretary.*' "

We, therefore, submit that there is nothing in the case to support a finding of fact that the Commissioners of the District of Columbia had abandoned the extension of Lamont Street, because the only evidence offered to prove such intention was inadmissible.

## IV.

### Abandonment As a Matter of Law.

It has been held repeatedly by this Honorable Court and by the Court of Appeals of the District of Colum-

bia that the Commissioners of said District are merely ministerial officers deriving their powers solely through the special grant of power by Congress. We submit, therefore, that the Honorable Court of Appeals in the present case has been inconsistent, not only with its own prior decisions, but has failed, as well, to follow the opinions of the Supreme Court of the United States.

A legal controversy closely approaching in similarity the situation presented by the case now before the court is exemplified by the case of Walter *vs.* MacFarland, 27 Appeals, D. C., 182. In that case the question before the court was whether the Commissioners of the District of Columbia had the power to make changes in the established public roadways of the city of Washington. The language of the opinion is so pertinent to the present case that the indulgence of the court is asked to quote at some length from the decision. The court said:

> "Municipal governments exist and exercise authority through legislative sanction. For convenience of administration they are created as agents of government for certain local purposes, and have such powers only as are expressly conferred or may be fairly and reasonably implied as necessary to carry into effect such as have been expressly granted. Barnett *vs.* Denison, 145 U. S. 135, 139, 36 L. ed. 652, 653, 12 Sup. Ct. Rep. 819. And while the laying out, opening, and improvement of streets in towns and cities are matters of peculiar fitness for municipal regulation and control, powers relating thereto must be similarly construed. • • •

"The municipal organization of the District of Columbia is of a peculiar character. There is no general organic law covering all of the ordinary powers usually conferred in the creation of municipal corporations throughout the several States of the Union,—no formal municipal charter, so to speak.

"The commissioners, though vested from time to time with the power to make important regulations, are ministerial officers. There is no special municipal council or legislative body, as was the case under the preceding form of municipal government. Congress possesses and has retained the powers of a local legislature. Sometimes it enacts special laws relating to local affairs, and sometimes it delegates to the commissioners extensive powers to make rules and regulations respecting specified subjects. The commissioners have no authority to raise revenues for the support of the local government, and those raised by the direct authority of Congress are not turned over to them for appropriation and expenditure at discretion.

"The title in fee to all streets and public reservations in the city of Washington is vested in the United States, and the public parks have been specially intrusted to the care and supervision of one of the departments of the general government. Congress has specially provided, from time to time, for the improvement and extension of the old, established streets, as well as for the opening of new streets, and the changing and closing of others. While such works are provided to be done under the general supervision of the commissioners, their discretion in all matters, including expenditures, is limited by the authorizing acts, and the special appropria-

> tions for the purpose. The commissioners cannot close streets; they cannot authorize private encroachments, occupations, or obstructions; they are not permitted to authorize the construction of a street-car line in them."

It will be noted that this case specifically decided "the commissioners cannot close streets." The question involved in the instant case is whether or not the Commissioners could abandon Lamont Street in view of the express provision of Congress that land be condemned for the purpose of extending Lamont Street, "said extension to be a direct prolongation of Lamont Street as now existing east of Nineteenth Street."

From the decision in Walter *vs.* MacFarland petition was made to this Honorable Court for the writ of certiorari. The petition was denied.

Again, in the case of Myers *vs.* D. C., 25 Appeals D. C., 132, the same doctrine is enunciated. Moreover, in the Myers case the Court of Appeals quoted from the opinion of the Supreme Court of the United States handed down in D. C. *vs.* Bailey, 171 U. S. 161, basing the opinion entirely upon what this Court held in the Bailey case. The significant expression which the Court of Appeals selected from the Bailey case for quotation was in the following words:

> "These officers are without general power to contract debts or to adjust and pay the same; that, on the contrary, the statutes expressly deprive them of such power, and limit the scope of their authority to the mere execution of contracts previously sanctioned by Congress, or which they are authorized to make by express

> statutory authority. The necessary operation of these provisions of the statutes is to cause the District commissioners to be merely administrative officers, with ministerial powers only. The sum of the municipal powers of the District of Columbia is neither vested in nor exercised by the District commissioners. They are, on the contrary, vested in the Congress of the United States, acting *pro hac vice* as the legislative body of the District, and the commissioners of the District discharge the functions of administrative officials."

Congress having once directed the Commissioners to extend Lamont Street, it is absolutely beyond *their* power to alter such direction or disregard that command.

If the court below is correct in its decision, an interesting question arises as to what becomes of the condemned land. Petitioner must return the money collected in payment of the benefits assessed, which is now the subject of other pending suits, but, having paid for the land and taken title to it, petitioner is in the position of being unable to do anything whatever with it, because it has been judicially determined that the street has been abandoned. We submit that this proposition alone demonstrates the error of the ruling of the court below.

**Conclusion.**

We, therefore, respectfully submit: First, that there was no contractual obligation existing between the Commissioners of the District and respondent and,

consequently, that the Municipal Court was without jurisdiction over the parties or of the subject-matter of said suit; second, that the Court of Appeals having held, in substance, that a contractual relation did exist, then any right of action thereunder was barred by limitations; third, that there is no valid evidence in the case to support a finding of fact that the District of Columbia had abandoned its intention to extend Lamont Street, and, last, that even were the Commissioners disposed to abandon this project, as a matter of law, they are powerless to do so.

Respectfully submitted,

WILLIAM W. BRIDE,
*Corporation Counsel;*
ALEX. H. BELL, JR.,
*Assistant Corporation Counsel,*
*Attorneys for Petitioner.*

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CHARLES ELMORE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1929.

No. 44.

DISTRICT OF COLUMBIA, PETITIONER,

*vs.*

GEORGIANA THOMPSON.

## BRIEF ON BEHALF OF RESPONDENT.

PAUL V. ROGERS,
WILLIAM E. FUREY,
*Attorneys for Respondent.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## BRIEF ON BEHALF OF RESPONDENT.

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### STATEMENT OF CASE.

With the exception of the omission noted below respondent accepts as fair and accurate petitioner's statement of the case.

In referring, on page 5 of petitioner's brief, to the letter of the Auditor of the District of Columbia to one

of counsel for respondent, petitioner fails to set forth that this letter was introduced and admitted in evidence for the sole purpose of establishing respondent's first knowledge of the intention of the District of Columbia to abandon, or that it had abandoned, the purpose for which the special assessment in question was levied and collected (R., pp. 8, 9). It expressly appears in the record (R., pp. 8, 9) that this letter was *not* considered by the trial court as an admission on the part of the District of Columbia.

## ARGUMENT.

### I.

### Jurisdiction of Municipal Court.

Counsel for the petitioner contend that the Municipal Court of the District of Columbia was without jurisdiction over the present cause of action for the following reasons, namely; that the assessment herein involved was a special levy, free from duress or mistake, in the exercise of the power of taxation, and upon which a personam obligation could not, therefore, legally be predicated; and further, that no valid contractual relation existed between respondent and petitioner as a result of the special levy because of the statutory disability of the Commissioners of the District of Columbia to enter into any contract not authorized by Congress. We respectfully submit that these objections are without merit.

Special or local assessments are similar to general taxation to the extent only that both are drawn from the legislative power to tax. *Baum v. Ross*, 167 U. S. 548. The general levy of taxes is understood to exact contributions in return for the general benefits of gov-

ernment, and it promises nothing to the person taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are levied upon the assumption that a portion of the community is to be specially benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds. The justice of demanding special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. Upon this basic idea are predicated all special assessments. To require the payment of a local assessment where no direct and equal benefit is given in return is a taking for the public use without just compensation and a violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

*Norwood v. Baker*, 172 U. S. 269
*Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190
*Baum v. Ross*, 167 U. S. 548.
*Hagar v. Reclamation District*, 111 U. S. 701

The action brought in the lower court was in general assumpsit for money had and received. The right to maintain an action in assumpsit in the Municipal Court of the District of Columbia is beyond question. Whether the action of assumpsit for money had and received will lie on the present statement of facts, we will now consider.

In the case of *Valentine v. St. Paul*, 34 Minn. 446, an assessment had been levied upon the plaintiff's property as benefits to enure from the grading of an abutting street. The assessment was paid and later the city abandoned the entire prospect. An action in assumpsit for money paid was brought by the taxpayer. It was said by the Court in sustaining the plaintiff's right to recover;

> "The city stands in the position of holding money collected from the plaintiff which it has no right in equity, good conscience, or common honesty to retain, because the purpose for which it was collected has been completely abandoned. In such circumstances no statute is required to impose upon the city a legal obligation to make restitution. An action lies as at common law for money had and received. No question of voluntary or involuntary payment before abandonment is material."

In the case of the *City of San Antonio v. Peters*, 40 S. W. 827 (Texas), the city proceeded by condemnation to widen a street, and in proceeding so to do levied a special assessment against the plaintiff's property for benefits. The plaintiff paid the assessment and later the city abandoned its intention to widen the street. The Court allowed the plaintiff to recover the assessment paid in an action in assumpsit on the theory that the abandonment of the purpose for which it was collected constituted a failure of consideration.

In *Bradford v. City of Chicago*, 25 Ill. 349, which was a suit to recover back moneys paid under special assessment, it was ruled that where a street is not opened in a reasonable time the moneys paid as assessments for benefits may be recovered back in assumpsit,

on the theory that the consideration has wholly failed. The Court said:

> "In projecting this improvement by the city, and raising money by condemning property supposed to be benefitted by the improvement, the city undertook that they would proceed according to law in making the assessments, and would devote the money raised to the completion of the undertaking, in a reasonable time. It was on this undertaking the plaintiff, voluntarily, we will say, paid his money. He trusted to the good faith, intelligence and integrity of the city officials, that by no fault, misconduct or miscarriage of their own, the work should be unreasonably delayed; that the improvement should be made in a reasonable time, and fully carried out. The city has failed to do it, and has given, and can give no assurance whatever that the improvement shall be made. The plaintiff may well contend, that he has paid his money on a consideration which has failed—that he has acquiesced in no delay, and that he ought to have his money restored to him, and which he demanded one year before he commenced his suit."

In every case in which this question has come to the attention of the courts of this country the right to recover the assessment paid by an action at law has been upheld.

*Valentine v. St. Paul*, 34 Minn. 446
*Bradford v. City of Chicago*, 25 Ill., 349, 359
*McConville vs. St. Paul*, 75 Minn. 383
*City of San Antonio v. Walker*, 56 S. W. 952
*Neer v. City of Salem*, 149 Pac. 476, 478.
*City of San Antonio v. Peters*, 40 S. W. 827

The inevitable conclusion to be drawn from the cases cited above is that the actual payment of a special

assessment—not the condemnation proceedings instituted to condemn the land out of which the assessment grew—gives rise to a personal obligation on the part of the condemning party to return the money collected when its payment is followed by an abandonment of the purpose for which it was collected and paid. It was pointed out by the Court in the Bradford case, *supra*, that in the case of special assessments the money raised by the condemning party is held in trust to be devoted to the particular purpose of the benefit intended. Whether the theory of failure of consideration, or that of a terminated trust is accepted, is of little importance; either theory sustains the right of the respondent to recover.

We respectfully submit that the present cause of action is not, as counsel for petitioner contend, based on a contractual obligation, but, to the contrary, is purely quasi-contractual in nature. The law needs no express contract nor statute authorizing restitution, to afford relief where the city has been unjustly enriched at the expense of the taxpayer. Valentine v. St. Paul, *supra*.

## II.

### The Statute of Limitations.

The operation of the Statute of Limitations in bar of the present cause of action necessarily requires a determination of the time when the right to maintain such action accrued. Counsel for petitioner contend (Brief page 10) that the lower Court held, as a matter of law, that a contractual relation existed between the parties to this suit obligating the District of Columbia to physically improve Lamont Street. Such an interpretation cannot properly be considered the ruling of

the lower Court. The question considered by the lower Court was whether the municipality might retain money collected as special benefits to accrue from the opening of a street without incurring any legal obligations to open it. (R., p. 18.) The levying and collecting of special assessments in anticipation of a street improvement is more properly to be considered as raising a condition that the purpose for which the assessment is levied and collected will be carried out. It is the violation of this condition, and not the breach of a supposed contract, which gives rise to respondent's right to recover back the assessment paid. Such being the case, we submit that the Statute of Limitations commences to run from a breach of the condition after notice of such breach can reasonably be imputed to the respondent. As was said in the case of the American Security & Trust Co. v. Rudoph, 38 Appeals, D. C., at page 42, "the assessments of damages and benefits must be based on the purposes for which the condemnation proceeding were directed." *A fortiori*, the collection and payment of the assessment levied must be based on the purpose for which the land in question was condemned. When that purpose is abandoned a right immediately accrues to the taxpayer to recover the amounts so paid. Any other conclusion would sanction the taking of private property for public use without compensation.

An examination of the record discloses that from February 3, 1913, the date when the land in question was condemned, until 1924, a period of eleven years, no attempt was made by the District of Columbia to open or improve Lamont Street. (R., p. 7.) The first alteration of the natural condition of the land condemned was in 1924 when the District of Columbia

laid and completed a cement sidewalk and curb across the east end of the condemned tract, creating an effective obstruction to any vehicular traffic over the land (R., p. 7). The lower Court held that this obstruction indicated an intent to delay the actual opening of the street, and was not *conclusive* of the intention on the part of the municipality to abandon the project. (R., p. 19). This act on the part of the District of Columbia, although not conclusive on the question of abandonment, is certainly evidence tending to prove abandonment and was so considered by the trial court together with the long lapse of time before its occurrence and the failure thereafter of the District of Columbia, by a removal of the obstruction or otherwise, to evidence an intention other than one of abandonment. There being no obligation imposed on the municipality by the Act of Congress of March 1, 1912, to open and extend Lamont Street within a specified time, respondent was required to wait patiently for the municipality to evidence its unwillingness so to do before an action would lie for a return of the assessment paid. It is our contention, therefore, that at the time of the letter from the Auditor of the District of Columbia to one of counsel for respondent, more than two years after the blocking of Lamont Street, petitioner's act of obstruction had ripened into a complete and conclusive abandonment. The contents of the letter, although not an admission of abandonment, placed respondent on her guard to either assert her right to a refund of the assessment paid, or be barred by the Statute of Limitations. This suit, having been filed on June 22, 1927 (R., p. 1) and within three years from the time when the right to maintain the same accrued, is therefore free from the operation of the Statute of Limitations.

## III.

## Abandonment.

Counsel for petitioner assign as error the ruling of the court below that the District of Columbia in fact abandoned the extension of Lamont Street, or could as a matter of law so abandon. We shall consider these objections separately.

*Abandonment as matter of fact.*

Counsel for petitioner contend that the only evidence on the question of abandonment before the trial court was the communication of the Auditor of the District of Columbia to one of counsel for respondent (R., p. 7), which letter, they contend, was improperly considered by the court below as an admission on the part of petitioner that it had abandoned the proposed extension of Lamont Street. This is clearly inconsistent with the record. The letter referred to was introduced and admitted in evidence at the trial of the cause for the sole purpose of establishing respondent's first knowledge of the intention of the District of Columbia to abandon, or that it had abandoned, the purpose for which the special assessment in question was levied and collected. (R., pp. 8, 9.) It further appears from an inspection of the record (R., pp. 8, 9) that this letter was not considered by the trial court as an admission on the part of the District of Columbia. The matters contained in the letter were accepted by the Court of Appeals as true in fact because of the judicial admission thereof by petitioner when the cause was before that court. (R., p. 19.)

Petitioner's argument that no other evidence of abandonment was submitted by respondent is at variance

with the record. We respectfully submit that all the elements of proof generally accepted by the courts of this country as tending to establish abandonment were before the trial court. The authorities herein submitted in support of the sufficiency of the evidence on the issue of abandonment constitute an unbroken line of decisions suporting respondent's claim.

*Valentine v. St. Paul*, 34 Minn. 446
*Bradford v. City of Chicago*, 25 Ill., 349, 359
*McConville vs. St. Paul*, 75 Minn. 393
*City of San Antonio v. Walker*, 56 S. W. 952
*Neer v. City of Salem*, 149 Pac. 478.
*City of San Antonio v. Peters*, 40 S. W. 827

The Supreme Court of Maryland expressed itself on this subject in the following language:

> "The cases hold that the abandonment of a right of way condemned may be brought about in one of two ways: An explicit renunciation of the purpose to give effect to the condemnation, which, in the case of a municipality would be by a repeal of the ordinance under which the proceedings were instituted; or such an abandonment may be deduced from acts in pais, and whether these acts constitute sufficient evidence of an intention to abandon the proceedings, is a question of fact." Wagner v. Bealmear & Son, 135 Md. 690, 694.

Time is an important element on the question of abandonment and particularly goes to the intent to abandon. The lapse of time alone may be sufficient; and a great lapse of time with slight circumstances may likewise be sufficient to establish abandonment. Addressing itself to this question the Supreme Court of Maryland said:

"It is obviously unjust for the city to hold a condemnation over property for years, neither paying the assessment nor abandoning the improvement." Norris v. Baltimore, 44 Md. 592.

See also:

*Holt v. Sargent*, 15 Grey (Mass.) 97
*Harkrader v. Carroll*, 76 Fed. 474, 475
*Johnson v. Rasmus*, 237 Mo. 586
*Burke v. Bishop*, 175 Fed. 167, p. 173
*Smith v. Gorrell*, 81 Ia. 218

The present case clearly falls within the doctrine or abandonment by acts in pais. The argument advanced by counsel for petitioner that abandonment, to be effective, must be based on formal renunciation by the proper officials of the municipality, is obviously fallacious. Such a rule of law would permit the municipality indefinitely to conceal its true intention behind a cloak of silence, and thereby preclude a taxpayer from the assertion of a just claim.

It is interesting to notice that the resolution of the Commissioners of the District of Columbia (petitioner's brief, p. 15) asserting the intention of the District of Columbia to improve Lamont Street is dated January 23, 1929, approximately two weeks after the handing down of the opinion of the Court of Appeals (R., p. 20) upholding respondent's cause of action as set forth in her declaration filed in the Municipal Court on June 22, 1927 (R., p. 1). The promptness of petitioner's action in the face of an adverse decision requires no comment.

*Abandonment as a matter of law.*

It is contended by counsel for petitioner that, as a matter of law, no abandonment can be established

against the District of Columbia because its commissioners are vested with ministerial duties only; that, having been once directed by Congress to extend Lamont Street, it was beyond the power of the commissioners to alter such direction or disregard that command. No comment is made on the authorities recognized by the Court of Appeals in its opinion (R., p. 19) as establishing the liability of municipal corporations generally in a case such as the present one. Their answer to respondent's claim is, in substance, that notwithstanding the right of the District of Columbia to acquire land for street purposes by the authorization and direction of Congress, and not withstanding the right to levy and collect special assessments for benefits to be derived from the opening and establishing of such street, the municipality may with immunity retain the assessments paid and forego the purpose of their collection because its commissioners are merely administrative officers.

We respectfully submit that this contention is contrary to sound principles of law and reason. Admitting, for the purposes of argument, that the officials of the District of Columbia are mere administrative officers, the corporate character of the city is undisturbed. This Court in the case of *The Metropolitan Railroad Co. v. District of Columbia*, 132 U. S. 1, 9, after an exhaustive consideration of the present commission form of government for the District of Columbia said:

> "We are clearly of opinion that the plaintiff (District of Columbia) is a municipal corporation, having a right to sue and be sued and subject to the ordinary rules that govern the law of procedure between private persons."

It was further said in *Barnes v. District of Columbia*, 91 U. S. 540, at page 547:

> "The authorities state, and our own knowledge is to the effect, that the care and superintendence of streets, alleys and highways, the regulation of grades, and the opening of new and closing of old streets, are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done."

The natural conclusion to be drawn from these cases is that the District of Columbia is a municipal corporation charged with the usual and ordinary duties and responsibilities of municipal corporations generally. The Act of Congress authorizing the institution of the condemnation proceedings in which the assessment in question was levied, did not, as opposing counsel contend, direct the actual opening and extending of Lamont Street, but to the contrary, merely authorized the institution of judicial proceedings to condemn the land necessary to extend Lamont Street and to assess the benefits and damages therein ascertained. The opening of the new street was, as stated by this Court in the Barnes case, *supra*, "peculiarly municipal." It was, therefore, to the District of Columbia that the respondent was required to look for her benefit. The case of *Walter v. MacFarland*, 27 App. D. C. 182, upon which counsel for petitioner relies in support of its present position, is obviously not in point. That case dealt solely with the narrowing of an established public street. Certainly the land condemned for the extension of Lamont Street can not be considered as an established public street.

The general power of control over streets, avenues, alleys, sewers and all public improvements intrusted by Congress to the charge of the former board of works under section 77, D. C. Rev. Stat. to which power the Commissioners succeeded by the Act of Congress of June 20, 1874, 18 Stat. 116, c. 337, when considered with the power and discretion vested in the Commissioners by the Act of Congress of June 11, 1878, 20 Stats. 104, to determine, annually, the work proposed to be undertaken during the fiscal year next ensuing, necessarily operates to invest the Commissioners with the authority to abandon a proposed street extension before its actual establishment, in the absence of legislative direction to the contrary. To say that the duties thus imposed on the Commissioners are ministerial in nature would be clearly at variance with settled law. The discretion vested in the Commissioners to determine the work proposed to be undertaken, necessarily carries with it a like discretion as to the rejection or abandonment of improvements proposed.

The taking of respondent's money, being based on the realization by her of an equivalent benefit to her land, is a matter cognizable by a court of law, and in a case such as the present the doctrine of estoppel operates to preclude any defense based on the limited authority of individual public officers or servants where the grievance complained of flows from the corporation itself.

Counsel for petitioner suggest that if the court below is correct in its decision and the city must refund the assessment paid, the municipality will be left with a tract of land which has been judicially determined to have been abandoned for street purposes, and therefore, of no use to the city. This, we submit, is without

foundation in fact. The property, being owned in fee simple by petitioner, may be adapted to any public use which may be deemed advisable. Or on the other hand, if the street extension project is revived, the city can, with proper legislative authorization, reassess for benefits and the payment thereof will properly fall on the present owners of the abutting properties. The passing of seventeen years from the date of condemnation in question has resulted in numerous changes of ownership of the abutting properties—a matter which can properly be judicially noticed—and therefore, it is self-evident that the original street extension project, if revived, would not yield to the many former owners who stood the expense of the contemplated improvement any of the benefits for which they were legally required to pay.

## Conclusion.

The present case presents to this Court a cause proper for the relief given in the lower courts. The respondent has been required to pay two hundred dollars as her share of the cost of extending a street which exists today only on the maps of the Surveyor's office of the District of Columbia. The injustice of the situation is, without exaggeration, shocking. The District of Columbia stands today the owner of a valuable tract of land acquired by condemnation and paid for with the money of respondent and persons similarly situated. *Not one cent* has been paid by the city, yet it has abandoned the purpose for which the assessments were levied, and has refused to make restitution of the money paid. The city stands in the position of holding money collected which it has no right

in equity, good conscience, or common honesty to retain. In defense of its position the city has forsaken the merits of respondent's claim and has merely advanced abstruse technicalities of law. We respectfully submit that the decision of the lower court should be affirmed.

PAUL V. ROGERS,
WILLIAM E. FUREY,
*Attorneys for Respondent.*

# SUPREME COURT OF THE UNITED STATES.

No. 44.—October Term, 1929.

District of Columbia, Petitioner, *vs.* Georgiana Thompson. } On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[February 24, 1930.]

Mr. Justice Sanford delivered the opinion of the Court.

Pursuant to an Act of March 1, 1912,[1] authorizing and directing them so to do, the Commissioners of the District of Columbia instituted in the Supreme Court of the District, under and in accordance with the District Code of Law, a proceeding in rem to condemn the land necessary to extend Lamont Street, northwest, with a width of ninety feet, through two designated squares west of its termination at 19th Street.[2] The strip of land necessary for this extension was condemned and title vested in the District, and the damages were awarded and the benefits assessed by a verdict of the jury. This was confirmed by the court in February, 1913. The sum of $200 was assessed as benefits against a lot owned by the respondent, Georgiana Thompson. Under the District Code this became a lien upon the lot, collectible as special improvement taxes and payable in five annual instalments.[3] In March, 1921, the lot was sold for nonpayment of the assessment, and in March, 1923, was redeemed by the respondent from such sale by the payment of the $200 and interest to the Collector of Taxes of the District.

In June, 1927, the respondent—hereinafter called the plaintiff—brought an action against the District in the Municipal Court, alleging that she had paid the assessment of benefits under obligation of law; that the District had wholly failed to extend Lamont Street through the designated squares, the strip of

[1] 37 Stat. 71, c. 48.

[2] The Act specifically provided that the amount awarded by the jury as damages for the land condemned for the extension, plus the costs and expenses of the proceeding, should be assessed by the jury as benefits.

[3] District Code of Law, § 491(j).

land condemned being yet unimproved by a street extension, and had abandoned the purpose of the condemnation authorized by the Act of Congress; and that she was entitled to the repayment of the $200 assessment—for which she claimed judgment. The District filed a plea to the jurisdiction of the court over the cause of action; and also an affidavit of defense, denying that it had abandoned the purpose of the condemnation for the extension of Lamont Street, and alleging that more than three years had elapsed since the time when the plaintiff's right of action, if any, had accrued to her. It was not alleged that the District intended to extend Lamont Street over the condemned strip at any future time.

At the trial the following facts—which are undisputed—were shown: Lamont Street, when the condemnation proceeding for its extension was instituted, had been paved, graded and laid out, east of 19th Street, with a roadway, sidewalks, curbing and parking spaces, and was open for vehicle and pedestrian traffic. Since the acquisition of the strip west of 19th Street and the confirmation of the verdict in 1913, no official action had been taken by the Commissioners or by Congress looking to the abandonment of the title thereto, or of the right of the District to improve it. However, since that time and up to the filing of the plaintiff's suit in 1927, Lamont Street had not been extended as an improved street, and the condemned strip had not been laid out for a roadway, sidewalk or parking space, nor graded, paved or otherwise improved for highway purposes; nor had Congress made any specific appropriation therefor. And although lying between two improved highways, 19th Street and Adams Mill Road, it still remained open, vacant property. For a short distance along its south side, at a time not shown, a cement sidewalk had been laid by a private person as an entrance to an apartment house, under a District permit. In March, 1924, the District had laid a cement sidewalk and curb along the west side of 19th Street and across the east end of the condemned strip, which constituted an effective obstruction to any vehicular traffic over it. And in January, 1926, in a letter declining to entertain an application made by the attorney for the plaintiff and others for a refund of the assessments on the ground that the District appeared to have abandoned the project for the extension of the street, the Auditor of the District had stated that the official files of the engineer department indicated that it had never been the intention to open the extension of Lamont Street to vehicu-

lar traffic because of the excessive grade, but that the principal reason for condemning the strip was to provide a vista and access to Zoological Park, and it was intended to treat the extension with terraces and steps.[4] It was not shown that the District had taken any step at any time looking towards the extension of Lamont Street over the condemned strip, or indicating its intention to make such extension at any future time.

The Municipal Court gave judgment for the plaintiff; and this, on writ of error, was affirmed by the Court of Appeals of the District. 30 F. (2d) 476.

We think the judgment should be affirmed.

1. Pursuant to the Act of Congress the strip of land was condemned for the extension of Lamont Street, an improved thoroughfare open for vehicular and pedestrian traffic and all the ordinary uses of a street. In the condemnation proceeding the jury were necessarily required to assess the benefits which would accrue from such extension, that is, from the extension of a street where one had not theretofore existed, and not from an unimproved strip of land merely. See *Washington R. & E. Co.* v. *Newman,* 41 App. D. C., 439, 445; and cases cited. That is, the consideration for the assessment of the benefits was the extension of Lamont Street over the condemned strip.

2. Under the undisputed facts we think the District was under an obligation imposed by law to return, as for a failure of consideration, the assessment of benefits that had been paid by the plaintiff.

In *Valentine* v. *City of St. Paul,* 34 Minn. 446, 448, benefits had been assessed against the plaintiff's land by reason of the proposed opening and extension of a street, and he had been compelled to pay the amount of this assessment to redeem his land from sale. No part of the street having been opened, and the project for opening and extending it having been abandoned by the city, he was held entitled to recover the amount paid as upon a failure of the consideration for the assessment. The court said that "the effect of the abandonment by the city of the project of 'extending and

[4]This letter was introduced by the plaintiff and admitted over the defendant's objection, to show her first knowledge that the defendant intended to abandon or had abandoned the purpose of the condemnation; but the defendant's exception to the overruling of its objection was not brought up by any assignment of error in the Court of Appeals.

opening' the proposed street for and on account of which, and which only, the assessment was made, is that the consideration of the assessment has wholly failed. So that the city stands in the position of holding in its treasury money collected from the plaintiff which it has no right in equity, good conscience, or common honesty to retain, because the purpose for which it was collected has been completely abandoned. In such circumstances no statute is required to impose upon the city a legal obligation to make restitution. An action lies as at common law for money had and received. . . That the city is a municipal corporation does not distinguish it from a private person in this respect." To the same effect are *McConville* v. *City of St. Paul*, 75 Minn. 383, *City of San Antonio* v. *Peters* (Tex. Civ. App.), 40 S. W. 827, *City of San Antonio* v. *Walker* (Tex. Civ. App.), 56 S. W. 952, and *Bradford* v. *City of Chicago*, 25 Ill. 411, involving assessments for the opening, extension and widening of streets. And see *Ward* v. *Love County*, 253 U. S. 17, 24, and cases cited.

In two of these cases the abandonment of the proposed street improvement for which the benefits had been assessed, although not shown by any affirmative act on the part of the municipality, was established by circumstances; in one where there had been the lapse of a reasonable time during which the city had done nothing to carry on the improvement, and there was no claim in its answer or proof that it desired or ever intended so to do, *McConville* v. *City of St. Paul, supra*, 386; and in the other where there had been the lapse of a reasonable time during which the city had done nothing to carry out the improvement, and there was no proof that it had been prevented by any obstacle in the way thereof, *Bradford* v. *City of Chicago, supra*, 417.

Here, although the Commissioners had been instructed by Congress to condemn the strip of land for the extension of Lamont Street, more than fourteen years had elapsed during which the District had neither made this extension nor taken any step towards that end; it showed no obstacle which had prevented such extension; it had built a sidewalk and curb across the strip which constituted an obstruction to vehicular traffic; and it made no claim in its pleadings or proof that it desired or intended to make such extension at any future time. We think that these circumstances established, as a matter of reasonable and necessary inference, the fact that the District had abandoned the purpose of extend-

ing the street over the condemned strip; and that, this being so, for the reasons well stated in the *Valentine* case, the District was properly required to return to the plaintiff, as for failure of consideration, the amount of the assessment that she had paid, which it had retained contrary to equity and good conscience and held, by implication of law, as money had and received to her use.

3. As the basis of the plaintiff's cause of action was the obligation imposed by law upon the District by reason of the failure of consideration for the assessment of benefits, it was one, we think, of which the Municipal Court had jurisdiction as a claim for debt arising out of an "implied" contract, not exceeding $300.[5]

4. Nor was the plaintiff's right of action barred by the statute of limitations of three years.[6] The District contends that the plaintiff's claim accrued either when the verdict of the jury assessing benefits was confirmed in February, 1913, or when she paid the assessment in March, 1923. This contention entirely misconceives the nature of the plaintiff's cause of action, which is not based upon any illegality in the original assessment that would have given rise to any right of action when the benefits were either assessed or paid, but entirely upon the abandonment by the District of the proposed extension. See *City of San Antonio* v. *Walker*, *supra*, 953. The Court of Appeals held upon the evidence that such right of action did not accrue until January, 1926; and this is not controverted.

The judgment is

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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[5]District Code § 9; Act of Feb. 17, 1909, 35 Stat. 623, c. 134.
[6]District Code, § 1265.